STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARRLIS DEWAYNE REEVES,

Defendant-Appellant.

UNPUBLISHED
July 15, 2003

No. 239271
Genesee Circuit Court
LC No. 01-008071-FC

Before: Hoekstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(c), and first-degree home invasion, MCL 750.110a(2). He was sentenced as a fourth habitual offender to consecutive terms of forty to sixty years and ten to twenty years, respectively. He appeals as of right, and we affirm.

Defendant first claims that the trial court committed reversible error in refusing defendant's request that the jury be instructed on the lesser offenses of second-degree home invasion, MCL 750.110a(3), and third-degree CSC, MCL 750.520d. We disagree.

We review de novo claims of instructional error. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). "[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). While second-degree home invasion, MCL 750.110a(3), is a necessarily included offense of first-degree home invasion, 750.110a(2), a rational view of the evidence did not support an instruction in the instant case where the prosecutor established that the victim was lawfully in the house when the offense occurred, and no evidence indicated otherwise. *People v Silver*, 466 Mich 386, 388; 646 NW2d 150 (2002). Where the trial court anticipated the Supreme Court's decision in *Cornell*, *supra*, the issue was sufficiently preserved to apply *Cornell* on appeal.[1]

[1] The *Cornell* Court stated: "Our decision in this case is to be given limited retroactive effect, (continued…)

With regard to the lesser offense of third-degree CSC, MCL 750.520d, we also find no error. In the instant case, the distinguishing element between first-degree CSC and third degree CSC was whether the sexual penetration, if found, occurred under circumstances involving the commission of another felony. MCL 750.520b(1)(c). There was no evidence that the perpetrator was in the victim's house in the middle of the night with permission, or that he entered without breaking, or that he had an innocent intent. While defendant may also have been guilty of third-degree CSC involving sexual penetration and force and coercion, the court was not obliged to instruct on the lesser offense where there was no dispute that any sexual penetration occurred under circumstances involving the commission of another felony.

Defendant next argues that because the prosecution presented alternative theories of first-degree home invasion the trial court should have specifically instructed the jury that it must reach a unanimous determination of guilt with regard to one theory or the other. We disagree.

Because this issue is unpreserved, this Court will grant relief only if necessary to avoid manifest injustice. *People v Sabin (On Second Remand),* 242 Mich App 656, 657-658; 620 NW2d 19 (2000). "[W]hen a statute lists alternative means of committing an offense, which means in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theories." *People v Gadomski*, 232 Mich App 24, 31; 592 NW2d 75 (1998). MCL 750.110a sets forth alternative means of committing first-degree home invasion. In the instant case, the prosecutor presented evidence that defendant both broke and entered the victim's dwelling, and entered without the victim's permission. Because the prosecutor presented evidence to support either theory of guilt, and defendant did not contradict this evidence, the trial court's general unanimity instruction was sufficient. *Gadomski, supra.*

Defendant next argues the trial court misscored offense variables (OV) 3, 7, and 10. We disagree.

We review a trial court's finding of a particular factor in sentencing guidelines for clear error. *People v Fields,* 448 Mich 58, 77; 528 NW2d 176 (1995). Where a victim receives physical injury requiring medical treatment, ten points are assessed under OV 3. MCL 777.33. The trial court's findings that the seventy-six year old victim suffered physical injury requiring medical treatment were substantiated by evidence that the victim sustained redness in the vaginal area, a knee abrasion, and was given an antibiotic, albeit prophylactically.

OV 7 involves aggravated physical abuse pursuant to MCL 777.37. Fifty points are assessed under OV 7 where a victim is subjected to "terrorism, sadism, torture, or excessive brutality." MCL 777.37(1)(a). The trial court's conclusion that defendant terrorized the victim was sufficiently supported by evidence that defendant made reference to the victim's dog (causing the victim to fear for her pets' safety), and told the victim that if she said anything, he would be back.

(…continued)

applying to those cases pending on appeal in which the issue has been raised and preserved." *Cornell, supra* at 367. An appeal had been filed in the instant case when *Cornell,* was decided.

Fifteen points are assessed under OV 10 where there has been predatory conduct. MCL 777.40(1)(a). "Predatory conduct" is defined as "pre-offense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). Defendant stated that he used to watch the victim walk her dog, thus supporting an inference that he identified the victim as vulnerable and determined where she lived. We conclude there was sufficient evidence to support the trial court's finding of predatory conduct and attributing fifteen points to OV 10.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Helene N. White